File Date
8/14/2006

(9)

No. 05-11284

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

JALIL ABDUL-KABIR,
Petitioner,

-v-

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT IN REPLY 1

1 **_Certiorari_ is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road** 4

2 **_Certiorari_ is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith** 6

3 **_Certiorari_ is warranted because the Fifth Circuit's basis for rejecting Petitioner's Penry I claim ignores the relevant mitigating qualities of Petitioner's evidence and is impossible to reconcile with Smith** 7

CONCLUSION AND PRAYER FOR RELIEF 9

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Johnson v. Texas, 509 U.S. 350 (1993) 3, 4, 7

Penry v. Johnson, 532 U.S. 782 (2001) 4, 6

Penry v. Lynaugh, 492 U.S. 302 (1989) ..... *passim*

Smith v. Texas, 543 U.S. 37 (2004) ..... *passim*

Tennard v. Dretke, 542 U.S. 247 (2004) ..... *passim*

United States Courts of Appeals

Cole v. Dretke, 443 F.3d 441 (5th Cir. 2006) 4

Cole v. Dretke, 418 F.3d 494 (5th Cir. 2005) 7

Davis v. Scott, 51 F.3d 457 (5th Cir. 1995) 8

Garcia v. Quarterman, ___ F.3d ___, 2006 WL 1932895 (5th Cir. 2006) 2, 6, 7

In re Kunkle, 398 F.3d 683 (5th Cir. 2005) 4

Smith (R.G.) v. Dretke, 422 F.3d 269 (5th Cir. 2005) 4, 5

Tennard v. Dretke, 442 F.3d 240 (5th Cir. 2006) 5

State Courts

Ex parte Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) 5

Ex parte Smith, 132 S.W.3d 407 (Tex. Crim. App. 2004) 8

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT IN REPLY

Respondent boldly asserts that Petitioner's jury "concluded that nothing in his history – not his neurological impairment, not his absentee parents, not his childhood hardships – was sufficiently mitigating to warrant a life sentence for the murder." Brief in Opposition ("BIO") at 1. Nothing could be further from the truth. As Respondent later admits, Petitioner's jury *was never asked* whether the mistreatment Petitioner suffered as a child, or his serious mental disorders, were "sufficiently mitigating" to justify withholding the ultimate punishment. Instead, the jurors were asked solely whether the evidence about Petitioner's background raised a reasonable doubt as to the "deliberateness" of his crime or the likelihood of his future dangerousness. *See* BIO at 3 ("At the punishment phase, Cole's jury addressed two issues: whether the killing was deliberate and whether

'there was a probability that Cole posed a threat of future dangerousness'"). Precisely because Petitioner's jury was *not* instructed to consider the mitigating significance of his background evidence for his moral culpability, Petitioner's death sentence violates well-settled constitutional norms. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I").

In addition to mischaracterizing the events of Petitioner's trial, Respondent minimizes the importance of the issue presented here, asserting reflexively that there is no "compelling reason" for the Court to grant review. BIO at 11 (citing Sup. Ct. R. 10). That claim flies in the face of the Fifth Circuit's demonstrated puzzlement about the plain language and import of Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*) – where this Court declared that the sentencing charge in a capital case must "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence," and that the former Texas statute fails that test where the jury's consideration of the mitigating evidence is "tied to findings of deliberateness and future dangerousness that ha[ve] little, if anything, to do with" the relevant qualities of that evidence. Id. at 38 (emphasis in original; citation omitted), 48. Respondent's assertion also ignores the fact that other panels of the Fifth Circuit, even as their colleagues have expressed such uncertainty, have continued to give a suffocatingly narrow reading to Smith, construing it in light of the Fifth Circuit's own pre-Smith decisions, rather than the other way around. *See, e.g.*, Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Assuming this Court meant what it said in Smith, the aggressive efforts of the Fifth Circuit and the Texas state courts to limit Smith's reach are indeed a compelling reason for a grant of *certiorari* in Petitioner's case. *See* Sup. Ct. R. 10(c) (*certiorari* may be appropriate when "a United States court of appeals has decided an important question of federal law ... in a way that conflicts with relevant decisions of this Court").

Regarding the merits of Petitioner's Penry claim, Respondent does not dispute that Petitioner's jury heard extensive mitigating evidence establishing his destructive and turbulent family background, impaired impulse control, and organic neurological impairment. BIO at 4-5, 13-14. Respondent also admits that, respecting this evidence, the jury was asked only whether the evidence indicated Petitioner killed "deliberately" and would pose a "continuing threat to society." BIO at 3.

On these facts, the straightforward reasoning of Smith would appear to compel the conclusion that the state court's decision upholding Petitioner's death sentence was an objectively unreasonable application of Penry I. If the former Texas statute precluded Smith's jury from giving "*full* effect" to Smith's mitigating evidence – which was materially indistinguishable from Petitioner's[1] – it could do no better as a vehicle for considering Petitioner's evidence. Even if, as Respondent argues, the jury could conceivably have answered the "future dangerousness" question "no" based on generic testimony that dangerousness generally declines with age, such testimony had "little, if anything, to do with" the relevant mitigating qualities of Petitioner's *actual* evidence – that Petitioner was grievously mistreated as a child and, as a result, developed serious psychological and emotional disorders as an adult. *Cf.* Johnson v. Texas, 509 U.S. 350, 369 (1993) (charge must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence).

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[1] Smith was nineteen years old; he had potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes. Smith, 543 U.S. at 41. Despite these handicaps, Smith had exhibited "exemplary" behavior in school. Id. Smith's father was involved with gang violence, and stole from the family to feed his own addiction to drugs. Id. Petitioner likewise had a "very rugged," "tough" and "painful" childhood, marked by neglect, abandonment, and mistreatment at the hands of alcoholic parents and grandparents, and his father, like Smith's, was a violent criminal. *See* Petition for Writ of Certiorari ("Petition") at 3-8. Like Smith, Petitioner suffers from organic neurological impairment and impaired impulse control, in addition to chronic depression and a "horribly distorted" personality as a result of the mistreatment he suffered as a child. Id. at 5-6.

As Judge Dennis argued in dissent below, the Fifth Circuit panel could reach the contrary conclusion only because it has made no effort in its post-Smith cases to take seriously the language of Smith and Penry II or to plumb the reasoning of those cases. As Judge Dennis pointed out, the Fifth Circuit's cases "erroneously denigrate[] the ... clearly established Supreme Court jurisprudence of Penry I ... specifically highlighted in Tennard and Smith." Cole v. Dretke, 443 F.3d 441, 443 (5th Cir. 2006) (Dennis, J., dissenting from denial of rehearing *en banc*). This Court should grant *certiorari* to correct the Fifth Circuit's "misinterpretation of Johnson v. Texas and Graham v. Collins," id., and to make clear that it means what it said in Smith.

1. *Certiorari* is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road.

One compelling reason to grant review here is that the Fifth Circuit has openly acknowledged its uncertainty about the meaning of Smith. *See* Petition 12-17. Soon after Smith, for example, the Fifth Circuit indicated that it understood Smith to be "limited to [evidence of] mental impairment," despite the absence of any such limitation in the text of this Court's opinion. *In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). The court below expressly added that whether Smith swept any more broadly was a question for *this* Court. Id. A few months later, in R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the Fifth Circuit acknowledged that its prior Penry jurisprudence, which had held that mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse" could be given adequate effect in answering the special issues, was in tension with Smith, where this Court indicated that at least two of those same factors had "little, if anything, to do with" the special issues. R.G. Smith, 422 F.3d at 287 n.8 (conceding that this Court's opinion in Smith appeared to take "the exact opposite" position from the Fifth Circuit's longstanding

view of Penry as essentially limited to cases involving evidence of mental retardation).

In a third decision in March 2006, the Fifth Circuit expressly acknowledged that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by this Court in Penry II and Smith. *See* Tennard v. Dretke, 442 F.3d 240, 253 n.7 (5th Cir. 2006). As in R.G. Smith, however, the Fifth Circuit discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

The Texas Court of Criminal Appeals ("CCA"), too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35.[2]

Understandably, Respondent's Brief in Opposition completely ignores these cases. Collectively, they demonstrate that there is an urgent need for this Court to correct the Fifth Circuit's misreading of Smith *now*, before it goes too far in the wrong direction.[3]

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[2] Smith's petition seeking review of the CCA's most recent decision in his case is pending before this Court *sub nom.* Smith v. Texas, No. 05-11304.

[3] The Fifth Circuit applied its baseless "constitutional relevance" test for mitigating evidence to deny Penry claims for nearly a decade before this Court struck down that rule as having "no foundation" in the Eighth Amendment. *See* Tennard v. Dretke, 542 U.S. 274 (2004). It would be regrettable if the Fifth Circuit's current and equally serious error – its misreading of Smith – essentially mooted this Court's recent efforts to set the jurisprudence straight.

2. *Certiorari* is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith.

As noted, in the absence of further guidance from this Court, the Fifth Circuit continues to veer from the course set in Smith. The most recent example of this trend is Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Garcia argued that the jury was unable to give mitigating effect to evidence that he had been repeatedly sexually abused before he was ten years old. *See* Garcia, 2006 WL 1932895 at *3 - *7 (describing penalty-phase evidence). Garcia's jury received only the two standard "deliberateness" and "future dangerousness" queries, plus a "nullification instruction." Id. at *7. The Fifth Circuit majority found no Penry error. While expressly disavowing any reliance on procedural default, the majority asserted flatly that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to claim later that he was harmed by the preclusive effect of the unconstitutional charge. Id. at *8 ("Garcia cannot seek mitigating treatment for his childhood abuse because he did not do so before the jury .... We respectfully disagree with the dissent's position that any evidence of childhood abuse must be considered under Penry regardless of the context in which it was offered at trial").

As Garcia makes clear, the Fifth Circuit is busily crafting new "screening tests" to evade Smith. *See* Garcia, 2006 WL 1932895 at *14 (Benavides, J., dissenting) (criticizing majority's rationale as "an end run around Penry II," an "approach ... at odds at least with the spirit of Tennard" for introducing another "threshold screening test ... [with] no foundation in Supreme Court precedent"), id. at *15 ("Instead of following [Penry's] mandate, the majority creates another

threshold screen"). It has gone from upholding the use of "nullification" charges as vehicles for the consideration of mitigating evidence to actually *requiring* that defense counsel have argued for nullification before the jury as a condition of later raising a Penry claim. Garcia, *supra*.

The longer this Court waits to intervene, the more distorted and begrudging the Fifth Circuit's application of Smith is likely to become.

3. *Certiorari* is warranted because the Fifth Circuit's basis for rejecting Petitioner's Penry I claim ignores the relevant mitigating qualities of Petitioner's evidence and is impossible to reconcile with Smith.

Respondent echoes the Fifth Circuit in placing dispositive weight on the fact that Petitioner's own experts had testified that all offenders tend to "burn out" and become less violent as they age, and asserting that the jurors could have based a "no" answer to the future dangerousness question on that testimony. BIO at 6, 15-16; Cole, 418 F.3d at 506-07. This analysis is mistaken, first, because it ignores the testimony of those same experts that Petitioner was presently dangerous and would remain so until "years from now." RR XVII at 813. It also ignores the fact that since Petitioner was just 31 at the time of trial, and his experts forecast his "burnout" to occur around age "forty-five" or "fifty," a reasonable juror would have concluded that Petitioner posed a threat of dangerousness for the next 15 to 20 years. By Respondent's own analysis, if jurors credited that testimony – and concluded that Petitioner would likely remain dangerous for at least the next few years – then they had *no* vehicle for giving effect to the remainder of Petitioner's mitigating evidence about his destructive childhood and mental impairment. That cannot be a correct outcome under Penry.

More important, the view urged by Respondent and adopted by the Fifth Circuit fails to give effect to this Court's teaching in Johnson that the charge must permit jurors to give effect to the "relevant mitigating qualities" of the defendant's evidence. The "relevant mitigating quality" of an

abused background or mental disorder is *not* that it makes the defendant less dangerous, but that it reduces his moral culpability. *That* aspect of the evidence is not captured in any way by the fact that there may exist some remote possibility that the disorder may become less severe as the years pass. Nor, contrary to Respondent's view, is it captured by testimony that all people generally become less prone to violence as they age. *See, e.g.*, RR XVII at 813 (the "process of aging" produces this effect "in all of us"). The mitigating inference that arises from such generic testimony is true for *any* offender; it speaks to the likelihood that *most* offenders become less dangerous as they grow older. This inference is no less true of mentally healthy defendants from loving and supportive backgrounds than it is of Petitioner, shaped by a background of neglect and mistreatment and burdened by neurologically impaired impulse control. For that reason, the "future dangerousness" question gave the jury *no* vehicle for expressing the conclusion that the *unique constellation of specific mitigating circumstances present in Petitioner's background* reduced his moral culpability for the crime so as to call for a life sentence.

It is instructive to recall that this Court turned aside a very similar argument in Smith. The Texas Court of Criminal Appeals had found that the jury could have given mitigating effect to Smith's background evidence in answering the "future dangerousness" issue. *Ex parte* Smith, 132 S.W.3d 407, 412-16 (Tex. Crim. App. 2004). The CCA reached this conclusion because the evidence suggested that, notwithstanding his impairments (including his low IQ) and turbulent home life, Smith's "behavior in school was often 'exemplary.'" Smith, 132 S.W.3d at 415. Accordingly, the CCA held, the jury could have determined that Smith was able to "control his conduct" notwithstanding his impairments and answered the future dangerousness question "no." Smith, 132 S.W.3d at 415 and n. 27 (citing, *inter alia*, Davis v. Scott, 51 F.3d 457, 464 (5th Cir. 1995), for the

proposition that where a "defendant's difficult childhood background evidence did not demonstrate that he was unable to learn from his mistakes, but rather that he responded positively to a structured environment, [the] second special issue provided sufficient vehicle for jury's consideration of [that] evidence").

This Court emphatically rejected the CCA's conclusion that Penry I was satisfied because the former special issues permitted the jury to give such indirect and anemic mitigating effect to Smith's evidence. The fact that Smith might learn to control his behavior *despite* his impairments did not make the future dangerousness question an adequate vehicle for considering those impairments in mitigation, because that question "had little, if anything, to do with [Smith's] mitigation evidence." Smith, 543 U.S. at 48. In precisely the same fashion, the fact that the jury might conceivably have found that the threat of violence posed by Petitioner would decline over time as a result of predictable aging processes that happen to "all of us" does not mean that the "future dangerousness" issue provided a meaningful vehicle for them to assess Petitioner's personal culpability in light of his tormented background and mental impairment.

CONCLUSION AND PRAYER FOR RELIEF

The evidence at trial showed that Petitioner was neglected, abandoned, and mistreated as a child, and that as a result of those experiences he suffered from emotional and psychological disorders, including a marked lack of impulse control, as an adult. It also indicated that Petitioner suffers from organic neurological impairments that affect his behavior. All this evidence reduced Petitioner's culpability for the murder of Raymond Richardson, but none of it could be given meaningful mitigating effect under the narrow "deliberateness" and "future dangerousness" inquiries of the former Texas statute. The state court's decision upholding Petitioner's death sentence against

a Penry I challenge is objectively unreasonable when contrasted to the proper Penry I analysis as modeled by this Court.

Since Smith, the Fifth Circuit has repeatedly questioned whether this Court meant what it said in that *per curiam* opinion. *See supra*; *see also* Petition at 12-17. Consistent with those purported doubts, the court below has never taken Smith's straightforward language seriously. Accordingly, absent intervention by this Court, Smith's mandate will not be given effect in the Fifth Circuit. That outcome would undermine the overriding goal of rationality in capital sentencing. *See* Petition at 35-37.

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner JALIL ABDUL-KABIR respectfully prays that this Court grant a writ of *certiorari* to give the judgment of the United States Court of Appeals for the Fifth Circuit in this case plenary review; in the alternative, Petitioner asks that the Court summarily reverse the judgment below; or grant such other relief as the interests of justice require, including holding Petitioner's case pending the outcome of any *other* case in which the Court grants review to consider the correct application of Penry, Tennard, and Smith.

Respectfully submitted,

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